

**From:** Stephen R. Savitzky  
**To:** Microsoft ATR  
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**Subject:** Microsoft Settlement

As a computer scientist with thirty years' experience in computer-related industries, I wish to submit my comments under the Tunney Act on the Proposed Final Judgment in United States v. Microsoft.

I agree completely with the problems identified in Dan Kegel's analysis (on the Web at <http://www.kegel.com/remedy/remedy2.html>), namely:

- \* The PFJ doesn't take into account Windows-compatible competing operating systems
- \* The PFJ Contains Misleading and Overly Narrow Definitions and Provisions
- \* The PFJ Fails to Prohibit Anticompetitive License Terms currently used by Microsoft
- \* The PFJ Fails to Prohibit Intentional Incompatibilities Historically Used by Microsoft
- \* The PFJ Fails to Prohibit Anticompetitive Practices Towards OEMs
- \* The PFJ as currently written appears to lack an effective enforcement mechanism.

The PFJ can be summarized briefly as saying that Microsoft agrees to publish some of its prices and license a few of its API's and protocols (possibly at a high price and for strictly limited purposes) while continuing nearly all of its current exclusionary practices and enjoying carte blanche to extend its monopoly into tablet PC's, palmtops, set-top boxes, game consoles, and in fact into every kind of product except desktop PC's, where it already enjoys a monopoly which the PFJ does little to address.

I would add that Microsoft's biggest competitor is the free, community-developed operating system GNU/Linux, and that many provisions of the PFJ (for example, section I, which provides for the payment of royalties for "any intellectual property rights owned or licensable by Microsoft that are required to exercise any of the options or alternatives expressly provided to them under this Final Judgment") seem expressly designed to prevent the community of individual developers that constitutes Microsoft's only effective competitor from deriving any benefit or protection under the PFJ. Moreover, I.3. explicitly allows Microsoft to refuse to license its technology for use in open-source software -- again its only effective competition.

Worse, Sections D and E include the phrase "for the sole purpose of interoperability with a Windows Operating System Product", thus explicitly allowing -- indeed, encouraging -- Microsoft to prohibit the development of a competing operating system that runs Microsoft applications.

Similarly, more PC's are manufactured and sold by small local and regional "white box" dealers than by large OEMs; these small entities similarly derive no benefit from the PFJ.

Then, too, PC's can be expected to be a rapidly-diminishing portion of Microsoft's operating system market: Microsoft operating systems are built into pocket-sized organizers (the Pocket PC), game consoles (the Xbox), set-top boxes (WebTV), and new products such as "tablet" computers and "web pads", not to mention servers. The PFJ in its current form explicitly excludes all of these non-PC devices from its proposed remedies.

Finally, a large part of Microsoft's monopoly power is derived from its ability to change file formats and protocols at will. This makes it practically impossible to write software that interoperates with Microsoft applications and operating systems, and allows Microsoft to force users to upgrade continuously in order to maintain access to their own data.

Considering that Microsoft has already been convicted of abusing its monopoly power, and that this conviction has been upheld on appeal, it hardly seems necessary to ask whether it is in the public interest to allow Microsoft to dictate the terms of its own "penalty" in a manner almost completely favorable to itself. However, the Tunney Act asks this question, and it seems safe to answer resoundingly in the negative.

I've been struggling to find a pithy analogy for this situation, but I can't. It's almost like the old joke in which a convicted murderer is given his choice of execution methods and chooses to die of old age. But this is monopoly, not murder, and it isn't funny.

What can be done to fix the PFJ? A few obvious improvements come immediately to mind. These can be briefly summarized as:

- o require Microsoft to publish all of its prices.
- o require Microsoft to publish all of its API's, protocols, and file formats, and allow them to be used for any purpose including the development of free, competing operating systems.
- o extend these provisions to all Microsoft operating system products, not just those that run on personal computers.

In particular,

1. Extend the "Covered OEMs" of section B to include ALL LICENSEES. Microsoft should publish its prices, period.
2. In section D, replace "... disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, for the sole purpose of interoperating with a Windows Operating System Product,..." with the phrase "... disclose to the public, for any purpose, ...", hence making all operating system API's freely available and allowing competing operating systems to run applications originally designed to run on Microsoft operating systems.
3. In section E, replace "make available for use by third parties, for the sole purpose of interoperating with a Windows Operating System Product, on reasonable and non-discriminatory terms (consistent with Section III.I)" with "make available to the public specifications for..." and hence require all communication protocols to be open. It is well known in the computer security community that any communication protocol which is not open to public scrutiny represents a grave risk to the public, because anyone who discovers a hidden flaw can exploit it for a long time before the flaw becomes known to others.
4. Insert a section similar to section E which replaces communications protocols used to interoperate with a Microsoft server operating system with file formats required to interoperate with Microsoft applications.
5. Modify section I.1. to require Microsoft to waive license fees for use in software which is freely given away. Modify section I.3. to allow licensees to freely distribute source code.
6. In VI section O, replace "Personal Computers" with "Computers".
7. Replace VI section Q with a suitable definition of "Computer" as any computing device that is capable of running a Microsoft Operating System Product. In any case, it must include both servers and such consumer products as tablet computers, pocket PC's, and game controllers.
8. In VI section U, define "Microsoft Operating System Product" as any Operating System sold by Microsoft.

I believe that these suggested changes are the minimum required to prevent Microsoft from not only perpetuating its current monopoly on the personal computer, but extending it into other, and indeed larger, areas.

Sincerely,  
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